[2019] IECA 369

THE COURT OF APPEAL

Record Number: 161CJA/18

Birmingham P.
McCarthy J.
Kennedy J.

BETWEEN/

SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993
THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

- AND -

AURELIJUS KIZELAVICIUS

RESPONDENT

JUDGMENT of the Court delivered (*ex tempore*) on the 11th November 2019 by Ms. Justice Kennedy.

1. In accordance with the established jurisprudence we now proceed to sentence Mr Kizelavicius as of today's date. Judgment was delivered by this Court on the 31st May 2019 concerning an application by the Director of Public Prosecutions pursuant to s.2 of the Criminal Justice Act 1993 where this Court found the sentence imposed was unduly lenient.

2. We did not proceed on that date to quash the sentence imposed as a Probation and Welfare Service Report was requested by the respondent and so ordered.

3. Paras. 4 – 22 hereunder address the application pursuant to s.2 and the decision of the Court on that date. We then proceed to address the re-sentence hearing of the instant date.

4. This is an application brought by the Director of Public Prosecutions pursuant to the provisions of s. 2 of the Criminal Justice Act 1993, seeking a review on grounds of undue leniency of a sentence which was imposed on the respondent on the 30th April 2018. The respondent pleaded guilty to a count of rape contrary to s.2 of the Criminal Law (Rape) Act, 1981 as amended by s.21 of the Criminal Law (Rape) (Amendment) Act 1990 and also a

count of assault causing harm contrary to s.3 of the Non-Fatal Offences Against the Person Act, 1997. The respondent was sentenced to a period of seven years' imprisonment with the final two years of that sentence suspended on terms.

Background

5. On the 27th March 2015, the complainant was walking home from the pub in the rain. Having seen the respondent sitting in his car nearby, she asked the respondent for a lift home. Once she arrived home, the complainant then invited the respondent into her home for a cup of tea. He then began making sexual advances towards her which advances she rebuffed. Following her refusal, the respondent then proceeded to beat the complainant up to six times with his closed fist to the face. He then removed her clothing, held her down and proceeded to rape her. The complainant stated that she was in fear for her life at this time. The respondent then left the house shortly thereafter and the complainant made contact with the Gardaí. She was taken to the Sexual Assault Treatment Unit where a full forensic examination took place. Photographs were taken of her injuries in the immediate aftermath of the offences by the Gardaí. The respondent was subsequently arrested and detained. The matter was listed for trial before the Central Criminal Court on the 19th February,2018 and the respondent entered pleas of guilty on the 21st February, 2018.

The Sentence

6. In sentencing the respondent, the trial judge referred to the violent nature of the offence in the following terms:-

> "The accused has pleaded guilty to the offence of rape and a rape that was accompanied by some considerable violence in this case. And unlike many rape cases that come before me of late involve a cavalier attitude towards consent. This is not such a case. This is a case where it is a straightforward rape with extra physical violence used in the course of that rape. And although there are two offences charged, they really are

one single incident and I'm treating them as such...It is a violent rape for which the Oireachtas provides a maximum penalty of life imprisonment"

7. In placing the offence in the middle category of offending with a headline sentence of seven years' imprisonment, the judge referred to the youth of the respondent and the plea of guilty which he characterised as "early" although he noted it was in circumstances where the strength of the evidence in the case made the pleas of guilty inevitable. The judge held that the respondent's previous conviction was not relevant to the offence at hand and whilst he acknowledged that the probation report did not place the respondent in a great light, he accepted that the report recommended a number of programmes for the respondent and he then proceeded to suspend two years of the sentence on the condition that the respondent co-operate with the Probation Services and attend any recommended programmes.

Personal circumstances

8. The respondent at the time was nineteen years of age. He is originally from Lithuania, he arrived in Ireland in 2006. The respondent has a number of previous convictions including several for driving offences, one conviction for common assault for which he received a three month suspended sentence.

Grounds of appeal

9. The appellant puts forward a number of grounds of appeal:-

(1) The learned sentencing judge erred in principle in that he failed to give any or adequate weight to the violence used by the respondent on the injured party. Specifically, the learned sentencing judge erred in principle in deeming the punching of the complainant repeatedly in the face with a closed fist as being "part of the rape" and not as an aggravating factor over and above the degree of violence or force inherent in the sexual offence itself;

(2) The learned sentencing judge erred in principle in taking the count relating to s.3 of the Non-Fatal Offences Against the Person Act, 1997 into account;

(3) The learned sentencing judge erred in principle in giving too much weight to the mitigating factors and inadequate weight to the aggravating factors when considering the appropriate factors to take in to account when passing sentence;

Submissions of the appellant

10. Mr Sammon SC on behalf of the appellant primarily argues that the judge erred in regarding the violence as "part of the rape" and not as an aggravating factor. The appellant refers to the decision of *The People (DPP) v. Tiernan* [1988] IR 250. where the Supreme Court held that, save in exceptional circumstances, rape should be punished with a substantial term of immediate imprisonment, even in the absence of aggravating factors. He says that the judge erred in failing to attach any or any sufficient weight to the physical violence suffered by the complainant at the hands of the respondent. Moreover, the judge erred, it is said, in law in not imposing a separate and distinct sentence for the offence of s. 3 assault.

Submissions of the respondent

11. Mr Prendergast BL on behalf of the respondent says that the Director has mischaracterised the judge's remarks in suggesting that the judge deemed the punching of the complainant as part of the rape offence. The respondent submits that the events occurred contemporaneously and as the judge stated, occurred in "a series of offending."

12. It is accepted by the respondent that the offence of rape should ordinarily attract a very severe sanction in accordance with the decision of *The People (DPP) v. Tiernan* [1988] IR 250 but the respondent disputes the manner in which the appellant characterises the judge's remarks and says that the sentencing judge had clear regard to the assault and that the assault

was the only notable aggravating feature of the case which resulted in it being placed in the mid-range of offending.

13. It is further submitted that the sentencing judge did not err in principle in placing the offence within the middle range and assessing the appropriate sentence as one of seven years and in light of mitigation by suspending the final two years of that sentence in order to incentivise rehabilitation. Moreover, the respondent argues that the sentencing judge had a discretion not to impose a separate sentence for the s.3 assault and submits that whilst it may be best practice to impose individualised sentences, a residual discretion remains, and that further, if any error did occur, it is submitted on behalf of the respondent that it is an error in respect of the charge contrary to s.3 of the Non-Fatal Offences Against the Person Act 1997.

14. In relation to the assertion that the judge did not have due regard to the aggravating factors, the respondent submits that the respondent's previous convictions did not relate to sexual offences and at the very minimum the respondent would have been entitled to the distinction between his own limited record and that of a 'repeat offender' for similar type offences.

15. In relation to the mitigating factors, the respondent argues in written submissions that the sentencing judge was entitled to assess the culpability of the respondent with regard to his age, level of maturity and personal circumstances as these matters stood at the time of the offending behaviour and says that a plea of guilty is of particular value in the context of rape offences.

Discussion and conclusion

16. The jurisprudence in this area clearly establishes that nothing save a substantial departure from the appropriate sentence will justify an intervention by this court on an application by the Director of Public Prosecutions. A sentence must be proportionate to the gravity of the offence and the personal circumstances of the offender. In the instant case

there were significant aggravating features, some of which were specifically identified by the sentencing judge.

17. Those factors included the fact that the respondent beat the injured party by punching her with a closed fist to the face five or six times, the consequential devastating impact on the victim and the fact that the attack took place in the victim's home. In this respect, it has been argued that the respondent was there by invitation and not as a result of a break-in, and therefore this factor aggravates the offence less then might otherwise be so, nonetheless it is an aggravating factor.

18. The injuries sustained as a result of the assault included a swollen jaw and a cut lip and photographs were provided to the judge in the court below. Those injuries were clearly evident in the immediate aftermath and we are told, made most unpleasant viewing. Issue is taken with the pre-mitigation sentence, that is the headline sentence of seven years nominated by the sentencing judge. Mr Sammon, SC for the Director argues that the judge failed to give any or any adequate weight to the violence perpetrated on the injured party in determining the appropriate headline sentence.

19. In mitigation it was urged upon the court below that the respondent had pleaded guilty and acknowledged responsibility for his offending conduct, that whilst the plea of guilty was entered three days after the matter was listed for trial, this was in circumstances where there was late disclosure of some material following which, pleas of guilty were entered. On this we observe that a guilty plea may merit significant discount but this depends upon the circumstances of the plea of guilty and in particular, the time when the plea of guilty is entered. A guilty plea saves victims of crime from having to give evidence and from having to undergo the rigours of cross-examination, but in this instance the injured party faced the prospect of giving evidence right up and until the third day when the matter was listed for trial.

20. Therefore, this cannot be considered to be an early plea but nonetheless was taken into consideration by the judge in determining the level of discount to be afforded to the appellant, although the judge properly observed that given the strength of the evidence, a plea of guilty was inevitable. The Court was also asked to take into consideration the fact that the respondent is a foreign national, however he has been resident in this jurisdiction from the age of twelve years. Ultimately, the final two years of the sentence were suspended on terms by the sentencing judge.

21. In our view, the sentence imposed was a lenient sentence. The question is whether the lenient sentence imposed is so unduly lenient, so as to require intervention by this Court. We have concluded that the level of violence perpetrated against the victim, apart from the violence of the rape itself, renders this sentence unduly lenient so as to require intervention by us. It is, in our view, a substantial departure from the appropriate sentence in the particular circumstances.

22. We will not however proceed at this juncture to quash the sentence imposed as we have been requested to order a probation and welfare service report for the second stage of the process and that is the consideration of the appropriate sentence to be imposed.

The Re- Sentence hearing on the 11th November 2019

23. We now quash the sentence imposed by the trial judge and we re-sentence the respondent as of today's date. We have received updated probation reports dated the 16th July, 2019 and the 3rd October, 2019, neither report is entirely favourable to the respondent. Since his incarceration he has received nineteen P.19s, (Disciplinary Procedures), however, as of the July report he was an enhanced prisoner and was attending the gym and school. Since the last time the matter was before this Court the respondent has lost that enhanced prisoner status, as he was placed on a protection regime for bullying and the intimidation of

others. By letter, the respondent indicates that he has applied for various courses in order to continue with his education.

24. When the respondent was first committed to prison, he was screened for the 'Building Better Lives' (BBL) Sex Offender Therapeutic Groupwork Programme. He declined to participate in that programme, and it seems he declined to do so due to his ongoing appeal. We have received a letter from the respondent wherein he now expresses his remorse for the events in question, this expression coming some one and a half years after sentence was imposed before the Central Criminal Court. Today we have been informed by his counsel that he is willing to participate in the 'Building Better Lives' programme.

25. In resentencing the respondent, we are mindful of the fact that we are imposing sentence at some remove from the date of the imposition of the sentence before the Central Criminal Court being the 30th April, 2018, and perhaps more significantly, that the respondent's sentence was backdated to the 1st November, 2016. He has therefore been unaware with any degree of certainty, of his release date due to this ongoing appeal against undue leniency.

26. Whilst the respondent himself sought adjournments for the preparation of probation and welfare service reports, nonetheless the period of time which has elapsed is something which we take into account in imposing sentence.

27. This was a most serious offence involving the rape of the unfortunate victim and with significant additional violence to that of the sexual violation of her, in that she sustained injuries to her face as a result of being struck by the respondent. We are satisfied that the appropriate pre-mitigation sentence or headline sentence for this rape offence is one of eleven years' imprisonment.

28. Taking into consideration the mitigating factors, including the plea of guilty, albeit not an early plea, and the late expression of remorse and apology which we hope will assist the

victim in moving forward, we will reduce that sentence to one of nine years' imprisonment. Allowing for the disappointment factor and to incentivise the rehabilitation of the respondent, in respect of which his willingness to participate in the 'Building Better Lives' programme is a first step, we will suspend the final two years of that sentence.

29. The post release supervision is to remain the same and we will take into consideration the assault count under s.3 of the 1997 Act.

28th June 2020